Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER 1976

No. 75-1711

ELI DANIELS and HARRY DANIELS d/b/a the Heart of the Black Hills Stations,

Petitioners,

v.

The Federal Communications Commission and The United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Black Hills Stations

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Constitutional Amendments, not cited directly, provisions thereof; due process, freedom to work, impositions of sanctions, restrictions of operation, Fifth & Fourteenth amendments. Petitions for review of grievance imply the First amendment.....

Statutes Cited:

47 U.S.C. 155 (e).....3, 6, 7,13
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IN THE
SUPREME COURT OF THE UNITED STATES
Term _____
No. _____

Eli Daniels and Harry Daniels d/b/a the Heart of the Black Hills Stations,
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v.

The Federal Communications Commission and The United States Of America,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petioners pray for a writ of certiorari to review the ORDER of the United States Court of Appeals for the District of Columbia Circuit, which dismissed their petition for review and denied their motion for declaratory judgment.

THE ORDER

The Court entered the Order on January 22, 1976 (Appendix A).

JURISDICTION

A timely petition for review was denied on February 27, 1976,(Appendix B).

The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTION PRESENTED

1. Whether the petitioners are entitled to judicial review of Commissions actions which dismissed, without a hearing, petitioners' application for a construction permit to install a new antenna system ?

2. Should the Court have had the complete record, for proper adjudication especially in this instant case wherein the agency acted ex parte without a hearing ?

3. Whether petitioners are entitled to declaratory judgment on the prima facie evidence presented on the legal wrong by the agencys actions of unreasonable delay and denial of due process ?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent parts of the Constitution of the United States of America:

First Amendment: "and to petition the Government for a redress of grievances."

Fifth Amendment: "nor be deprived of life liberty, or property, without due process of law".

Fourteenth Amendment: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The following statutes and pertinent parts thereof:

47 U.S.C. 155 (e); "and other action taken as may be necessary or appropriate to expe_ dite the prompt and orderly conduct of the business of the Commission with the objective of rending a final decision (1) within three months from the date of filing of all original applications, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the filing date of the hearing in all hearing cases; and the Commission shall promptly report to the Congress each such case which has been pending before it more than such three- or six-month period, respectively, stating the reason therefor."

47 U.S.C. 309 (a): "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies whether the public interest, convenience, and necessity will be served by the granting of such application and upon consideration of such other matters as the Commission may officially notice, shall find the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

47 U.S.C. 309 (e): "If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground and reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest.....etc....".

47 U.S,C. 402 (a): Any proceeding to enjoin, set aside, annual, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 89-554, Sept. 1966.

47 U.S.C. 402 (b): "Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction

permit or station license, whose application is denied by the Commission."

47 U.S.C. 405: "The filing of a petition for rehearing shall not be a condition pre- to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the preceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission has been afforded no opportunity to pass."

28 U.S.C. 2342. Jurisdiction of court of appeals.

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-

(1) all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47; ".

STATEMENT OF THE CASE

Petitioners first filed for judicial review in the U.S. CT of Appl. 8th circuit, where the petition for review was dismissed for lack of jurisdiction of that court pursuant to 47 U.C. 402 (b).

Petitioners then timely filed petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. File No. 75-1799 was assigned. Jurisdiction was invoked under 47 U.S.C. 402 (b) and the right to review was on 5 U.S.C. 702, P.L. 89-554. In this court the Commission also

moved to dismiss for lack of jurisdiction pursuant to Sec. 402 (b) of the Communications Act! And that the requirements of 47 U.S.C. 155(d)(7) had not been met. 1/

Petitioners replied to the respondents' motion to dismiss claiming that since the Commission did not comply with the requirements of 47 U.S.C. 155(e) - in assigning the application for hearing - the dismissal of said application was not a decision to which we could take exception to in accordance with 47 U.S.C. 409 (b). Petitioners further claimed that the filing of a petition for rehearing in this instant case was not a condition precedent to judicial review pursuant to 47 U.S.C. 405. (p. 5 supra).

In further rebuttal to the Commissions motion to dismiss, petitioners charged that the evidence presented therewith was post facto evidence, that the events of the evidence was subsequent by at at least ten months and in some cases by years, after we had filed the application for the construction permit to install a new antenna system. The installation of which would have eliminated the very technical violations cited in the evidence!

In the interim, petitioners filed a motion

1/. A pleading in conflict with its pleading in the Eight Circuit.

to declare the respondents in default of statute 47 USC 402(d); filing of the record. Respondent moved to defer filing of the record to which petitioners filed objection. The Court thereon ;

ORDERED that the motion to declare the respondent in default be denied, and it

FURTHER ORDERED that the time for filling of the record be extended for a period of 30 days from the date the Court rules on the pending motion to dismiss.

Petitioners filed a motion, for declaratory judgment on whether or not certain agency action and orders, which affected the petitioners were legally wrong, and which did impose a sanction that adversely affected and restricted petitioners ability to operate in a just manner. 2/

On Oct 30 1975 the Commission filed opposition to motion for declaratory judgment. In the pleading the Commission reiterated its pleadings in its motion to dismiss petition for judicial review. It did not rebutt the petitioners charges of legal wrong.

On Jan 22 1976 the Court issued the ORDER (appendix A). A timely petition for rehearing was denied (appendix B).

2/ Jurisdiction- 28 USC 2201-, and the relevent statutes, Sec. 5(e) & 309 (a) & (e) of the Act. 5 USC 703Form & Venue.

REASONS TO GRANT CERTIORARI

To consider questions 1 & 2

Petitioners are entitled to judicial review for the following reasons: -

The application for a construction permit (BPCT-4077) was dismissed by the commission ex parte without a hearing. The lower court dismissed our petition for review without reviewing the record. The court dismissed on the basis that we had not exhausted administrative remedies; However it would have been futile and time wasting to petition for rehearing by the agency since there had been no hearing and it was apparent that it was a final action by the agency. 3/

Further since the dismissal of our application was a final order as explained supra, we point to 28 USC 2342(1) which

3/. See Appendix D for excerpts of cases on final orders & ex parte w/o hearing situations. Page 4a: —

provides for review of all final orders of the FCC in the Court of Appeals.

Federal Communications Commission's final orders are not limited to last order issued in a proceeding, for review purposes, but to be final an order must impose an obligation deny a right, or fix some legal relationship as consummation of administrative process. 28 U.S.C. 2342 - Id. In this instant case the agency took the action to dismiss to complete the case arbitrarily and not in accordance with law!

The modification of our instrument of authorization was the subject matter and therefor we are entitled to judicial review within the purview of 402(b) in the U.S. Court of Appeals for the District of Columbia Circuit. Quoting from: Cook, Inc. v. FCC, 394 F.2d 84, "Provisions of federal statute requiring that appeals from the FCC's order exercising its licensing power be taken to Court of Appeals for the District of Columbia and general provision covering appeals from all other orders are mutually exclusive. Communication Act of 1934. # 402(a,b), 47 USC (a,b); 28 USC 2341-2350._(statutes, pages 4 & 5 supra).

Petitioners further claim that they are entitled to judicial review within the purview of 47 USC 405, since the filing of a petition for rehearing was not a condition precedent to judicial review in this instant case. (see page 5 supra excerpt, 405). Quoting from Gerico Investment Co. v. F.C.C., 240 F. 2d 411; "The obvious purpose of Sec. 405 is to afford the Commission an opportunity to consider and pass upon matters prior to their presentation to the court. The Commission itself does not assert that it lacked that opportunity in this case.""Such is exactly the situation in this instant case!"

The application (BPCT-4077) has been before the FCC for over seven (7) years! We were never asked questions after the initial filing period. On numerous occasions we inquired as to the status of the application. No material subject matters were brought up. The only response we received was that it was on file and pending. Therefor the requirements of 47 U.S.C. 155(d)(7) have been met.

For further consideration to question 2, reference is made to several cases in Appendix D, numbered as 2d, 3d, 7d, & 8d.

Circuit Conflict

The Eight Circuit and the D.C. Circuit of Appeals are in conflict on the jurisdiction issue. The ORDER by the Eight Circuit on case No. 75-1242, which was our petition for review in that court reads as follows: Last two sentences, "The FCC order dismissing the petitioners' application for a construction permit is clearly within the purview of 402(b), and this Court, there for, lacks jurisdiction.

Accordingly, the petition is dismissed. Local Rule 9(b).

Attest: Robert C. Tucker Clerk.

dated Aug 18,1975

Petitioners then timely filed in the United States Court of Appeals for the District of Columbia Circuit within the jurisdiction of 402(b) where it was also dismissed for lack of jurisdiction!

REASON TO GRANT CERTIORARI
To Consider Question 3

Petitioners hereby present reasons that they are entitled to declaratory.

The prima facie evidence of legal wrong due to agencys action of undue delay is shown by the FCC's letter of dismissal; Appendix C, dated Mar. 17 1975. The Application (BPCT-4077) was filed on Jan 22, 1968. A delay of over seven years!

The motion for declaratory judgment before the lower court in effect requested judgment on whether or not the agencys actions which affected petitioners, were legally wrong, without observance of procedure required by law and which did impose a sanction that adversely affected and restricted petitioners, in violation of due process provisions of the United States Constitution. 4/

4/. Although courts will rarely order FCC to hold a hearing looking into possible grant of particular application, there may be circumstances where length of delay is so excessive of reasons for delay so arbitrary that a hearing must be

continued---

The jurisdiction of the Court was cited as the Declaratory Judgment Act, Title 28 U.S.C. 2201 & 2202, and the Administrative Procedure and Judicial Review Act.

The relevant statutes relied on were 47 U.S.C. 155(e) & 309(a,e) and 5 U.S.C. 558 & 701 et seq.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted
Eli Daniels and Harry Daniels d/b/a
The Heart of the Black Hills Stations,

Eli Daniels

May 1976.

Eli Daniels Gen.Mgr.
1438 Mt. View Drive
Rapid City, South Dakota

- continued. 4/. ordered to prevent substantial injustice. Kessler v. FCC D.C. 1967, 326 F.2d 673, 117 U.S. App. D.C.

Arbitrary or capricious administrative action cannot be sustained and finding of fact which is based upon erroneous view of law must be set aside. Williams v. Celebrezze. D.C. Ark. 1965, 243 F. Supp. 103.

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 75-1799 September Term, 1975

Robert A. Bonner,
Clerk

Eli Daniels and
Harry Daniels d/b/a The Heart of the Black Hills Stations,

Filed Jan 22, 1976

Petitioners,

v.

The Federal Communications Commission and the United States of America,

Respondents.

BEFORE: Leventhal and Wilkey, Circuit Judges

O R D E R

On consideration of respondent's (Federal Communications Commission) motion to dismiss petition for review, of petitioners' motion for declaratory judgment, and of the responses filed with respect to the forgoing motions, it is

ORDERED by the Court that petitioners' motion for declaratory judgment is denied, and it is

FURTHER ORDERED by the Court that respondent's motion to dismiss is granted and the petition for review herein is dismissed for lack of jurisdiction due to petitioners' failure to exhaust their administrative remedies before the Commission.

Per Curiam

APPENDIX B

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 75-1799 September Term, 1975
Filed Feb 27 1976

George A. Fisher,
Clerk

Eli Daniels and Harry Daniels d/b/a
The Heart of the Black Hills Stations,

Petitioners,

v.

Federal Communications Commission
and The United States Of America,

Respondents

BEFORE: Leventhal and Wilkey, Circuit Judges

O R O D E R

On consideration of petitioners' petition for rehearing of judgement order filed January 22, 1976, it is

ORDERED by the Court that petitioners' aforesaid petition is denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER, CLERK

By: Daniel M. Cathey
First Deputy Clerk.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554
MAR 27 1975

file
8820

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Eli Daniels and Harry Daniels,d/b/a
The Heart of the Black Hills Stations
1438 Mountain View
Rapid City, South Dakota 57701

Gentlemen:

This refers to your application (BPCT-4077) for changes in the authorized facilities of station KRSD-TV, Rapid City, South Dakota, filed with the Commission January 22 1968.

On November 1, 1971, the Commission released its decision, 32 FCC 2d 196, denying your application for renewal of the licenses of KRSD-TV and KDSJ-TV, Lead,South Dakota. Reconsideration was denied, 36 FCC 2d 568, and the Commission's decision was affirmed per curiam by the United States Court of Appeals for the District of Columbia, The Heart of the Black Hills Stations v. FCC, Case No. 72-1804 (1973), cert. denied. Subsequently, your petition for rehearing was denied. By an Order, 41 FCC 2d 170, released June 5, 1973, you were awarded temporary authority to operate both stations until further order of the Commission, while the Commission considered requests for interim operating authority..

App. C continued

In view of the above, and inasmuch as you are no longer a Commission licensee, it appears that it is no longer necessary for the Commission to entertain your application. Accordingly, your application (BP-CT-4077) for changes in the authorized facilities of television station KRSD-TV IS HEREBY DISMISSED.

Sincerely yours

Wallace E. Johnson
Chief, Broadcast Bureau

APPENDIX D

1d. Order dismissing without a hearing a protest of the granting of an application of competitor to change frequency and power of its broadcasting station was reviewable under tit. 47 USC 402. Metropolitan Television Co. v. U.S., 95 App DC 326, 221 F2d 879

Appendix D cont.

App. continued

2d. "Where a determination has been made ex parte, the only way in which a court can determine whether it is supported by substantial evidence is by evaluating it in light of all the evidence which was available to the Secretary, not simply the evidence recited by the Secretary in support of his formal decision. The SUPREME COURT has recently noted where no formal hearing has been held; "(R)eview is to be base on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.
Citizens & Preserve Overton Park, Inc. v. Volpe. 401 U.S. 420, 91 S.Ct. @ 825, 28 L.Ed2d 136 (1971).

3d. "The Court of Appeals cannot escape its duty to scrutinize the record as a whole to determine whether conclusions reached have reasonable basis in law; and if, based on the record as a whole, Secretary's conclusions are rational, they must be upheld; but if, reliance has been placed on one portion of the record to disregard of overwhelming evidence to contrary Court of Appeals is equally bound to decide against the Secretary.
Ainsworth v. Finch, 437 F.2d @ 447, U.S. Ct. Appl. 9th Cir. 1971.

App. D. continued, 4d:
On final Orders...: Agency order, although not the last order of an administrative proceeding, is a final order for purposes of review by Court of Appeals under Section 28 USC 2342 if it imposes an obligation, denies a right, or fixes some legal relationship which may cause irreparable injury.
Lee v. Federal Marine Bd. CA Wash. 1960. 284 F2d 577.

5d: Moreover, the relevant consideration in determining finality are whether the process of administrative decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action. ICC v. Atlantic Coast Line R. Co., 383 U.S. 576, 602 (1966); Rochester Telephone Corp. v. United States, 307 U.S. 125, 143 (1939). Here there was no possible disruption of the administrative process; there was nothing else for the Commission to do and certainly the Commission's action was expected to and did have legal consequences. Marine Terminal v. Rederi. Transatlantic. (1970) 91 S. Ct. 203, 400 U. S. 62 @ 71, 27 L.Ed 2d 203.

App. D continued:

6d. In order for an order of the FCC to be a reviewable final order it must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. Illinois Citizens Committee for broadcasting v. F.C.C. C.A.D.C. 1975, 515 F.2d 397.

On a final order: see, Trans-Pacific Freight conference of Japan v. Federal Maritime Bd., 1962, 302 F.2d 875, 112 U.S. App. D.C. 290.

7d. The judicial review of an administrative agency's act is not a trial de novo determination; however, when the agency has acted exparte without a hearing, the only way in which a court can determine whether it is supported by substantial evidence is by evaluating it in the light of all evidence which was available to the administrative agency, not simply the evidence recited by the agency in support of a formal decision, Sierra Club v. Hardin (1971, DC Alaska) 325 F Supp 99.

8d. Review of record. To determine whether there was arbitrainess, capricious, abuse of discretion, or otherwise not in accordance with law; the focal point for judicial review should be administrative record already in existence, not some new record made initially in reviewing court. Camp v Pitts (1975) 411 US 138, 36 L Ed 2d 106, 98 S Ct 1241.

Complete record; necessary to determine see:-- Thomas v. Celibrezze. 331 F2d 541, 543 (4th Cir. 1964).